

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
	:	
v.	:	No. 99-730
	:	
ANDREW BROWN, also known as TYREE BRYANT,	:	CIVIL ACTION
Defendant.	:	
	:	No. 04-4121
	:	

**MEMORANDUM & ORDER**

YOHN, J.

June \_\_\_\_, 2005

Defendant Andrew Brown, a prisoner at the United States Penitentiary in Allenwood, Pennsylvania, brings this *pro se* motion to vacate, set aside, or correct his sentence pursuant to 28 U.S.C. § 2255. After reviewing the record, I will grant defendant's request for an evidentiary hearing on his one ineffective assistance of counsel claim that relates to his trial counsel's alleged failure to call Andre Williams to testify at trial. For the reasons set forth below, I will deny the balance of the motion without an evidentiary hearing.

**I. BACKGROUND**

On September 28, 1999, defendant Andrew Brown was arrested by Philadelphia Housing Authority ("PHA") Police Officers Olney Johnson and Fredrick Boyle following a high-speed automobile chase in North Philadelphia. On November 4, 1999, while defendant was in state custody, United States Magistrate Judge Carol Sandra Moore Wells signed a federal criminal complaint and arrest warrant charging defendant with a violation of 18 U.S.C. §922(g)(1), which prohibits convicted felons from "possess[ing] in or affecting commerce, any firearm or

ammunition . . .”<sup>1</sup> On November 16, 1999, a federal grand jury returned an indictment against defendant. The case was subsequently assigned to this court where a jury trial commenced on May 31, 2000.

At trial, the government called two witnesses, Officer Johnson and Philadelphia Police Detective Timothy Brooks, who investigated defendant’s case immediately after his arrest. Johnson gave his account of the events leading up to defendant’s arrest. According to Johnson, at approximately 9:40 p.m., he and Officer Boyle saw defendant standing in the PHA’s Richard Allen Homes public housing site holding a large handgun.<sup>2</sup> (N.T. Trial, May 31, 2000, at 41–44.) When the officers exited their patrol vehicle to investigate, defendant ran to a parked car, entered the vehicle, and drove away at a high rate of speed. (*Id.* at 45–47.) Johnson testified that the officers pursued defendant for several city blocks in their patrol car until defendant’s vehicle slammed into a telephone pole in the 1400 block of Master Street, which is located outside of the PHA’s territorial limits. (*Id.* at 47–48.) At this point, Johnson testified that defendant exited his vehicle, dropped the gun, and fled on foot. (*Id.* at 58.) Johnson eventually apprehended defendant and arrested him, while Officer Boyle recovered the gun (*Id.* at 58–60, 93.)

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<sup>1</sup>Defendant was also charged under 18 U.S.C. § 924(e), which provides that “[i]n the case of a person who violates section 922(g) of this title and has three previous convictions by any court referred to in section 922(g)(1) of this title for a violent felony or a serious drug offense, or both, committed on occasions different from one another, such person shall be fined under this title and imprisoned not less than fifteen years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of, or grant a probationary sentence to, such person with respect to the conviction under section 922(g).” (citations omitted).

<sup>2</sup>Specifically, Johnson testified that he saw defendant standing on the corner of 11<sup>th</sup> and Poplar Streets. (N.T. Trial, May 31, 2000, at 43.) The Richard Allen Homes housing site encompasses the area between 12<sup>th</sup> and Poplar, 10<sup>th</sup> and Poplar, 12<sup>th</sup> and Fairmount and 10<sup>th</sup> and Fairmount. (*Id.* at 41.)

Next, the government called Detective Brooks. Brooks described his interview with defendant immediately following defendant's arrest. Brooks testified that at the interview, defendant identified himself as "Tyree Bryant."<sup>3</sup> (N.T. Trial, May 31, 2000, at 112.) However, Brooks was able to use documents discovered in defendant's car to determine defendant's true identity on the Philadelphia Police system. (*Id.* at 116–19.)

Brooks also testified about the weapon recovered at the scene. He explained that he could not identify the origin of the weapon because the serial number had been filed off. (*Id.* 120–21.) Brooks also explained that he chose not to submit the weapon for fingerprint analysis because Officer Johnson and Officer Boyle both maintained that they saw defendant holding the gun. (*Id.* at 122–23.)

Defendant called no witnesses. Defendant stipulated that he was a convicted felon, that the weapon described in the indictment was a "firearm" within the meaning of 18 U.S.C. § 921, and that the weapon was manufactured outside of Pennsylvania and thus satisfied § 922(g)(1)'s interstate commerce requirement. (*Id.* at 36–37.) Trial counsel<sup>4</sup> focused on the remaining

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<sup>3</sup>Officer Johnson also testified that defendant gave him the name "Tyree Bryant." (N.T. Trial, May 31, 2000, at 62.)

<sup>4</sup>Throughout these proceedings, defendant was represented by four separate attorneys. Defendant's first attorney, a member of the federal defender's office, was appointed on November 17, 1999 and withdrew sixteen days later. Defendant's second attorney ("trial counsel") was appointed on December 3, 1999, and represented defendant through his trial. Following trial, on September 15, 2000, defendant filed a *pro se* motion to relieve and appoint new counsel. The court granted the motion and on October 12, 2000, the court appointed defendant's third attorney ("post-trial counsel"). Post-trial counsel represented defendant through his sentencing. He was permitted to withdraw as counsel by the Third Circuit on June 26, 2001. The Third Circuit appointed defendant's final attorney ("appellate counsel") on November 26, 2001. Appellate counsel represented defendant through his appeal and was permitted to resign on November 21, 2002, before defendant filed his motion for rehearing with the Third Circuit.

element of § 922(1) and attempted to prove that defendant never possessed the gun in question by impeaching Johnson and Brooks's testimony. Nonetheless, on June 1, 2000, the jury found defendant guilty.

On October 12, 2000, defendant filed a *pro se* motion for arrest of judgment and a new trial. In the motion, defendant made three separate claims. He charged (1) that trial counsel was ineffective, (2) that his indictment was deficient because it did not contain essential facts and elements of the crime, and (3) that he had discovered new evidence that proved that he never possessed the firearm at issue. On March 9, 2001, the court denied defendant's motion<sup>5</sup> and on May 4, 2001, the court sentenced defendant to 270 months in prison.

Next, on May 9, 2001, defendant filed a notice of appeal with the Third Circuit Court of Appeals. On appeal, appellate counsel raised three issues. He argued (1) that the government failed to prove § 922(g)(1)'s affecting commerce element, (2) that defendant's sentence was excessive, and (3) that defendant was deprived of his right to a fair trial because testimony concerning his alias tainted the jury. *See United States v. Brown*, 54 Fed. Appx. 342 (3d Cir. Nov. 6, 2002) (non-precedential). On November 6, 2002, the Third Circuit rejected these arguments and affirmed the court's judgment. On June 9, 2003, after appellate counsel was permitted to withdraw, defendant filed a *pro se* petition for *en banc* rehearing with the Third Circuit, which that court denied on June 25, 2003. Then, on November 20, 2003, defendant filed a *pro se* petition for writ of certiorari with the United States Supreme Court. The Court denied

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<sup>5</sup>The court denied defendant's ineffectiveness claims without prejudice because in the Third Circuit, a § 2255 motion, not a post-trial motion, "is the preferred vehicle for a federal prisoner to allege ineffective assistance of counsel." *United States v. Nahodil*, 36 F.3d 323, 326 (3d Cir. 1994); (*see also* N.T. Post-trial hearing, Feb 5, 2001, at 34–35.)

defendant's petition on April 19, 2004. *See Brown v. United States*, 541 U.S. 1005. Finally, on August 31, 2004, defendant filed the instant *pro se* motion to vacate, set aside, or correct his sentence.

The motion raises four general issues. First, defendant contends that the firearm was seized in violation of the Fourth Amendment because the PHA police had no authority to arrest defendant outside of PHA's territorial limits.<sup>6</sup> (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 3–8.) Second, defendant argues that the government violated defendant's right to a speedy trial under the Fifth Amendment, the Sixth Amendment, and the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.* (*Id.* at 8–9.) Next, defendant asserts that the indictment violated his right to due process because it did not bear the signature of the grand jury foreman as required by Federal Rule of Criminal Procedure 6(c). (*Id.* at 10–11.) Finally, defendant brings innumerable ineffective assistance of counsel claims, which challenge nearly every facet of his various lawyers' performances. (*Id.* at 11–24.)

## II. DISCUSSION

### A. Timeliness

Defendant's motion is governed by the Antiterrorism and Effective Death Penalty Act of

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<sup>6</sup>Defendant actually argues that the court lacks subject matter jurisdiction over the case because the PHA police had no authority to arrest him. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 3–4.) However, there is no legal basis for this argument and I will assume that defendant intends to raise a suppression issue because the cases he cites were decided under the Fourth Amendment. *See Commonwealth v. Brandt*, 691 A.2d 934 (Pa. Super. Ct. 1997) (concluding that the lower court properly suppressed evidence seized by the Pittsburgh Housing Authority Police because the Authority Police had no jurisdiction to arrest the defendant off of the Authority's property).

1996 (“AEDPA”). *See Lindh v. Murphy*, 521 U.S. 320, 327 (1997). Under AEDPA, a federal prisoner seeking habeas relief pursuant to 28 U.S.C. § 2255 must file his motion within one year of the date on which his judgment of conviction became final. 28 U.S.C. § 2255; *see also Burns v. Morton*, 134 F.3d 109, 111–12 (3d Cir. 1999). Defendant’s conviction became final on April 19, 2004, when the Supreme Court denied defendant’s petition for writ of certiorari. Defendant filed the instant motion on August 31, 2004, 133 days after his conviction became final. Hence, defendant’s motion is timely,<sup>7</sup> and I may proceed to the merits.

B. 28 U.S.C. § 2255 standards and exhaustion requirement

28 U.S.C. § 2255 permits a federal prisoner to move the sentencing court to vacate, set aside, or correct his sentence if “the sentence was imposed in violation of the Constitution or laws of the United States, . . . the court was without jurisdiction to impose [the] sentence, . . . the sentence was in excess of the maximum authorized by law, or [the sentence] is otherwise subject to collateral attack . . . .” When a prisoner files a § 2255 motion, the district court may dismiss the motion without an evidentiary hearing if “the motion and files and records of the case show conclusively that the movant is not entitled to relief.” *Virgin Islands v. Forte*, 865 F.2d 59, 62 (3d Cir. 1989) (citation omitted). In making this determination, “the court must accept the truth of the movant’s factual allegations unless they are clearly frivolous on the basis of the existing record.” *Id.*

“A Section 2255 petition is not a substitute for an appeal.” *Gov’t of Virgin Islands v. Nicholas*, 759 F.2d 1073, 1074–75 (3d Cir. 1985) (citation omitted). Hence, defendants must

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<sup>7</sup>The government initially argued that defendant’s motion was untimely. However, after defendant submitted documentation of his petition for writ of certiorari, the government conceded that defendant’s petition was filed within AEDPA’s statute of limitations.

first raise claims on direct appeal before bringing the claims in a § 2255 motion. *United States v. Essig*, 10 F.3d 968, 979 (3d Cir. 1993). If a defendant fails to preserve a claim on direct appeal, a court may not consider the claim in a subsequent § 2255 motion unless the defendant can establish “cause and prejudice,” *Id.* (citing *United States v. Frady*, 456 U.S. 152, 167 (1982)), or a “fundamental miscarriage of justice.” *Murray v. Carrier*, 477 U.S. 478, 496 (1986). There is one significant and oft-used exception to the exhaustion requirement. Defendants need not raise ineffective assistance of counsel claims on direct appeal to preserve these issues for § 2255 review. *United States v. DeRewal*, 10 F.3d 100, 103–04 (3d Cir. 1993); *see also United States v. Nahodil*, 36 F.3d 323, 326 (3d Cir. 1994) (“A § 2255 motion is a proper and indeed the preferred vehicle for a federal prisoner to allege ineffective assistance of counsel.”).

C. Legality of defendant’s arrest

Defendant contends that the court should have suppressed the firearm seized pursuant to his arrest because the PHA police had no authority to arrest him outside of the PHA’s territorial limits. (Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot. at 3–4.) Defendant failed to raise this claim during trial or on direct appeal. Hence, the claim is procedurally defaulted and I may only reach the merits if defendant can show “cause and prejudice” or a “fundamental miscarriage of justice” to excuse the default.

To establish “cause,” a defendant must show that some “external” factor that “cannot fairly be attributed” to him impeded the defense’s efforts to raise the claim. *Coleman v. Thompson*, 501 U.S. 722, 753 (1991). Examples of “cause” include a showing that “the factual or legal basis for a claim was not reasonably available to counsel,” that “some interference by officials made compliance impracticable,” or that “the procedural default is the result of

ineffective assistance of counsel.” *Murray v. Carrier*, 477 U.S. 478, 488 (1988) (citations omitted).

Defendant charges that trial counsel was ineffective for failing to raise the legality of his arrest in a pre-trial suppression hearing. (Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot. at 14.) Thus, before I may decide whether defendant has alleged sufficient “cause” to excuse the procedural default of his suppression claim, I must evaluate whether counsel’s failure to raise this issue was ineffective assistance of counsel.

To establish ineffective assistance of counsel, a defendant must show that: (1) his attorney’s performance was deficient, and (2) the deficient performance prejudiced his defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show deficiency, a defendant must establish that counsel’s performance, “fell below an objective standard of reasonableness under prevailing professional norms.” *Buehl v. Vaughn*, 166 F.3d 163, 169 (3d Cir. 1999) (citing *Strickland*, 466 U.S. at 688.) Under *Strickland*, counsel is presumed to have acted within the range of “reasonable professional assistance,” and the defendant bears the burden of “overcoming the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’” *Strickland*, 466 U.S. at 689 (citation omitted). To show prejudice, a defendant must establish that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694.

Here, counsel’s performance was not deficient for failing to challenge the legality of

defendant's arrest because defendant did not have a valid Fourth Amendment claim.<sup>8</sup> Defendant relies on *Commonwealth v. Brandt*, 691 A.2d 924 (Pa. Super. Ct. 1997) to show that the PHA had no authority to arrest him. In *Brandt*, the court concluded that the lower court properly suppressed evidence seized by a Pittsburgh Housing Authority Police Officer pursuant to a warrantless arrest two blocks from the Authority's property because the Authority Police had no jurisdiction to arrest the defendant off of the Authority's property. The court relied on 35 Pa. Cons. Stat. § 1550(ee), which provides that "[i]n a city of the second class," police officers appointed by an "Authority" "shall have the same rights, powers and duties as other peace officers in the Commonwealth . . . on and adjacent to the grounds and the buildings of the Authority."

Defendant's reliance on *Brandt* is misplaced because § 1550(ee) only governs "a city of the second class" and Philadelphia, where defendant's arrest took place, is a "city of the first class."<sup>9</sup> See *Commonwealth v. Bavusa*, 832 A.2d 1042, 1063 (Pa. 2003) (observing the Philadelphia is "the only city of the first class in this Commonwealth."). Unlike housing authority officers in "a city of the second class," authority officers in "a city of the first class" have jurisdiction "in and upon the grounds and buildings of the Authority and in instances of hot pursuit within the boundaries of the city of the first class . . . ." 35 Pa. Cons. Stat. § 1550(ff).

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<sup>8</sup>"Although the question of the merit of an underlying claim is not an explicit step under *Strickland*, [the Third Circuit has] held that it is a determinative factor in the 'deficient performance' prong of the *Strickland* analysis in at least some contexts." *Rompilla v. Horn*, 355 F.3d 233, 249 n.9 (3d Cir. 2004) (citing *Parrish v. Fulcomer*, 150 F.3d 326, 328, where the court held that counsel was not ineffective for failing to raise a meritless claim).

<sup>9</sup>35 Pa. Stat. § 101, provides that cities "containing a population of one million or over shall constitute the first class."

Here, the officers had jurisdiction to arrest defendant off of PHA property because they were in “hot pursuit” of defendant. The officers first observed defendant standing within the boundaries of a PHA housing site and they only left PHA’s grounds because defendant appeared to be holding a firearm and he fled in a car at a high rate of speed when the officers approached him. Further, in accordance with § 1550(ff), the officers arrested defendant “within the boundaries” of Philadelphia. Hence, defendant’s arrest was legal and counsel’s performance was not deficient for failing to challenge the arrest in a suppression hearing. *See Werts v. Vaughn*, 228 F.3d 178, 203 (3d Cir. 2000) (“[C]ounsel cannot be deemed ineffective for failing to raise a meritless claim.”) (citation omitted).<sup>10</sup> Because petitioner’s counsel was not ineffective, petitioner cannot show “cause” to excuse the procedural default.<sup>11</sup>

Defendant has not alleged that failure to consider his Fourth Amendment claims will result in a “fundamental miscarriage of justice,” which ordinarily requires a showing of “actual innocence.” *Schlup v. Delo*, 513 U.S. 298, 327 (1995). Hence, I conclude that defendant’s challenge to the legality of his arrest is procedurally defaulted and the default is not excused.

Further, even if defendant could overcome the procedural default, the court may not review defendant’s Fourth Amendment claim pursuant to the Supreme Court’s decision in *Stone*

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<sup>10</sup>Moreover, trial counsel credibly testified that he perceived no legal basis to seek suppression and that he made a valid tactical decision not to file a suppression motion because it would have involved cross-examination of the police on the same factual events that would be the subject of his cross-examination at trial and would thus “show [his] hand” to the police in advance of trial. (N.T. Pre-trial hearing, May 30, 2000, at 10.)

<sup>11</sup>Because defendant has failed to show “cause” for the procedural default, I need not determine whether there was “prejudice.” *See Coleman v. Thompson*, 501 U.S. 722, 750 (1991).

*v. Powell*, 428 U.S. 465 (1976).<sup>12</sup> In *Stone*, the Court held that federal courts may not re-litigate Fourth Amendment claims in § 2254 habeas actions brought by state prisoners so long as the state provided the petitioner with “an opportunity for full and fair litigation” of the claim.<sup>13, 14</sup> *Id.* at 494. Courts have interpreted *Stone*’s “opportunity for full and fair litigation” language to require only that the government provide the defendant with adequate processes to obtain review of the defendant’s Fourth Amendment claim. *See Caver v. Alabama*, 577 F.2d 1188, 1192 (5th

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<sup>12</sup>The government failed to argue *Stone* in its opposition to defendant’s motion. Nonetheless, the majority of courts have concluded that district courts may raise *Stone sua sponte*. *See Woolery v. Arave*, 8 F.3d 1325, 1327 (9th Cir. 1993) (determining that district courts must raise *Stone sua sponte* “if the state neglects to assert it.”); *Davis v. Blackburn*, 803 F.2d 1371, 1373 (5th Cir. 1986) (“Where the record clearly shows that a petitioner had a full and fair hearing in state court, we hold that a federal court is not foreclosed from *sua sponte* applying the principle of *Stone*.”); *but see Reinert v. Larkin*, 211 F. Supp. 2d 589, 597 (E.D. Pa. 2002) (“[T]he state’s failure to [raise *Stone*] in a timely and unequivocal manner may waive the defense.”) (quoting 2 James S. Liebman & Randy Hertz, *Federal Habeas Corpus Practice and Procedure* § 27.2 (3d ed. 1998)).

<sup>13</sup>“The Court reasoned that the incremental benefit in deterring illegal police conduct by applying the exclusionary rule in a habeas proceeding did not outweigh the cost to society of excluding relevant, reliable evidence in a criminal prosecution.” *Gilmore v. Marks*, 799 F.2d 51, 54–55 (3d Cir. 1986).

<sup>14</sup>Although the Supreme Court has not squarely resolved whether *Stone* applies to § 2255 motions, the Court has hinted, in dicta, that federal prisoners may not re-litigate Fourth Amendment issues on collateral attack, *see United States v. Johnson*, 457 U.S. 537, 562 n.20 (1982), and several courts of appeal have come to a similar conclusion, *see United States v. Cook*, 997 F.2d 1312, 1317 (10th Cir. 1993) (“It is clear that the Court intends for Fourth Amendment claims to be limited in § 2255 proceedings as they are limited in § 2254 proceedings -i.e., to be addressed only if a defendant has not had a full and fair appeared to raise the claims at trial and on direct appeal.”); *Tisnado v. United States*, 547 F.2d 452, 456 (9th Cir. 1976); *see also United States v. Byrd*, No. 93-6660, 1995 U.S. Dist. LEXIS 2506, at \*12 (E.D. Pa. Mar. 2, 1995) (“Given the Supreme Court’s frequent crossover between § 2254 and § 2255 cases we are convinced that *Stone* would preclude Byrd’s Fourth Amendment argument in this § 2255 action.”). Hence, I will assume that *Stone*’s bar applies here.

Cir. 1978) (“An ‘opportunity for full and fair litigation’ means just that: an opportunity. If a state provides the processes whereby a defendant can obtain full and fair litigation of a fourth amendment claim, *Stone v. Powell* bars federal habeas corpus consideration of that claim whether or not the defendant employs those processes.”); *Gates v. Henderson*, 568 F.2d 830, 839 (2d Cir. 1977) (en banc) (same); *Cohen v. Gillis*, No. 01-7316, 2004 U.S. Dist. LEXIS 13904, at \*11 (E.D. Pa. July 16, 2004) (“It . . . appears well settled that *Stone* bars federal habeas review of a Fourth Amendment claim when a petitioner could have litigated that claim in the state tribunals - whether or not the petitioner actually litigated the claim.”). Hence, if a defendant fails to raise a Fourth Amendment claim on direct review due to his attorney’s incompetence, the defendant may not obtain review of the claim on collateral attack so long as the government did not restrict the defendant from bringing the claim in any way. *See Hubbard v. Jeffes*, 653 F.2d 99, 103 (3d Cir. 1981) (concluding that the petitioner had “a full and fair opportunity” to present his Fourth Amendment claim in state court even though counsel failed to raise the claim because “[t]he failure . . . was not brought about by any restriction of the opportunity by the state courts.”); *see also United States v. Hearst*, 638 F.2d 1190, 1196 (9th Cir. 1980) (“If the provided opportunity [to raise a Fourth Amendment issue on direct review] has been squandered due to defense counsel’s incompetence or misconduct, a convict’s only option on collateral review is a Sixth Amendment claim based on inadequate assistance of counsel.”) (citation omitted).

Here, there is no evidence that the court prevented defendant from obtaining a “full and fair” review of his Fourth Amendment claim. Hence, under *Stone*, the court may not review defendant’s substantive Fourth Amendment claim.

D. Defendant’s speedy trial claim

In his next ground for relief, defendant claims that the government violated his right to a speedy trial under the Speedy Trial Act of 1974, 18 U.S.C. § 3161 *et seq.*, the Fifth Amendment, and Sixth Amendment. (Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot. at 8.) Defendant also failed to raise this substantive claim at trial or on direct appeal and consequently it is procedurally defaulted unless defendant can show “cause and prejudice” or a “fundamental miscarriage of justice.”<sup>15</sup> Defendant charges that trial counsel was ineffective because he failed to move to dismiss the indictment on speedy trial grounds. (Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot. at 19.) Thus, to determine whether defendant has alleged sufficient “cause” to excuse the procedural default of his speedy trial claims, I must evaluate whether trial counsel’s failure to object on these grounds constitutes ineffective assistance of counsel.

Trial counsel was not ineffective for failing to object on speedy trial grounds because defendant did not have a colorable claim under the Speedy Trial Act, the Fifth Amendment, or the Sixth Amendment. *See Werts*, 228 F.3d 178, 203 (3d Cir. 2000) (“[C]ounsel cannot be deemed ineffective for failing to raise a meritless claim.”). The Speedy Trial Act requires federal authorities to file “[a]ny information or indictment charging an individual with the commission of an offense . . . within thirty days from the date on which such individual was arrested or served with a summons in connection with such charges.” 18 U.S.C. § 3161(b). The Act further provides that any charges in a complaint that violate § 3161(b) “shall be dismissed or otherwise dropped.” 18 U.S.C. § 3162(a).

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<sup>15</sup>The government failed to raise the possibility that defendant’s speedy trial claims are procedurally defaulted, but I may raise this issue *sua sponte*. *See Smith v. Horn*, 120 F.3d 400, 408 (3d Cir. 1997).

Defendant contends that the court should have dismissed the indictment pursuant to § 3162(a) because the federal grand jury returned the indictment forty-nine days after his arrest by the PHA police on September 28, 1999. Defendant mistakenly assumes that his arrest by local authorities triggers the Speedy Trial Act's thirty-day time limit. However, the Act only governs federal arrests and indictments. See *United States v. Mills*, 964 F.2d 1186, 1189–90 (D.C. Cir. 1992) (en banc) (“[A] state arrest does not trigger the Speedy Trial Act's clock, even if the arrest is for conduct that is the basis of a subsequent indictment for a federal offense.”); *United States v. Luna*, No. 00-600, 2002 U.S. Dist. LEXIS 6207, at \*6–\*7 (E.D. Pa. Apr. 10, 2002) (“Although our Court of Appeals has not ruled on the issue, at least three appellate courts have decided that the Speedy Trial Act, 18 U.S.C. § 3161(b), is not implicated until a defendant is either taken into federal custody on federal charges or indicted on them.”).

Here, defendant was not taken into custody by federal authorities until November 4, 1999 at the earliest, when United States Magistrate Judge Wells signed a criminal complaint and arrest warrant for defendant. The federal grand jury returned the indictment against defendant on November 16, 1999, twelve days after his federal arrest and well within the Speedy Trial Act's thirty-day time limit.

Similarly, defendant cannot make out a speedy trial claim under the Fifth or Sixth Amendment. Under the due process clause of the Fifth Amendment, a defendant may be entitled to relief for a delay in the indictment if the defendant can show “(1) that the delay between the crime and the federal indictment actually prejudiced his defense; and (2) that the government deliberately delayed bringing the indictment in order to obtain an improper tactical advantage or to harass him.” *United States v. Beckett*, 208 F.3d 140, 150–51 (3d Cir. 2000). In *Beckett*, the

Third Circuit concluded that the defendant failed to make out a due process claim where the federal government waited six months after the defendant's state arrest to bring an indictment because the defendant failed to prove either prejudice or improper intent. *Id.* at 151. Here, the government only waited forty nine days to return an indictment against defendant. Further, like the defendant in *Beckett*, defendant has failed to adduce any evidence that this minimal delay prejudiced him in any way, or was improperly prolonged to give the government a tactical advantage.

Defendant also cannot make out a speedy trial claim under the Sixth Amendment based on the delay in his indictment. The Sixth Amendment right to a speedy trial attaches upon arrest or "formal indictment." See *United States v. Marion*, 404 U.S. 307, 320 (1971). It is unclear "whether a state arrest activates Sixth Amendment protections if followed by a federal prosecution." *Luna*, 2002 U.S. Dist. LEXIS 6207, at \*7 & n.7 (observing that the Third Circuit has not decided this issue, but other courts of appeal "have taken various approaches.") (citations omitted). Nonetheless, even if the Sixth Amendment were implicated upon defendant's September 28, 1999 arrest by state authorities, the forty-nine day delay between that arrest and the federal indictment did not violate defendant's Sixth Amendment rights.

To determine whether a defendant's Sixth Amendment right to a speedy trial has been violated, courts consider the following four factors: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Here, the delay between defendant's arrest and his federal indictment is insignificant, especially since only twelve days elapsed between filing of the criminal complaint against defendant and the return of the indictment. Further, because the federal authorities were

not involved in defendant's initial arrest, it was reasonable for the government to wait forty-nine days before defendant's indictment to investigate the crime. In addition, defendant failed to assert his right to a speedy trial until this habeas motion, which was filed on August 31, 2004, nearly five years after the allegedly offending delay. Finally, defendant has failed to come forward with any evidence of prejudice that resulted from the delay between his state arrest and the federal indictment.

E. The allegedly deficiency of the indictment

Next, defendant contends that the indictment violated his right to due process because it did not bear the signature of the grand jury foreperson as required by Federal Rule of Criminal Procedure 6(c).<sup>16</sup> (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 10.) Again, defendant failed to raise this issue at trial or on direct appeal.<sup>17</sup> Defendant contends that appellate counsel was ineffective because he failed to raise this issue on appeal. Nonetheless, this allegation is insufficient to show "cause" to excuse the procedural default because defendant's claim is clearly frivolous and "counsel cannot be deemed ineffective for failing to raise a meritless claim." *Werts*, 228 F.3d at 203.

Contrary to defendant's assertions, the original copy of the indictment, which was filed with the Clerk's Office and I have reviewed, bears the grand jury foreperson's signature. Moreover, even if the foreperson failed to sign the original indictment, it is well-settled that "the

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<sup>16</sup>This rule provides that the grand jury foreperson "will sign all indictments." Fed. R. Crim. P. 6(c).

<sup>17</sup>Although defendant challenged the sufficiency of the indictment in his motion for arrest of judgment and a new trial, he did not raise any claims in connection with the grand jury foreperson's signature until the present motion.

absence of the foreman’s endorsement is only a technical irregularity and not fatal to the indictment.” *United States v. Aimone*, 715 F.2d 822, 826 (3d Cir. 1983) (citing *Frisbe v. United States*, 157 U.S. 160, 163–65 (1895)); *see also Hobby v. United States*, 468 U.S. 339, 345 (1984) (same); Advisory Committee Notes to Fed. R. Crim. P. 6(c) (same). Because defendant had no ground to challenge the validity of his indictment, appellate counsel was not ineffective for failing to raise this issue and defendant cannot show “cause” to excuse the procedural default.

F. Defendant’s ineffective assistance of counsel claims

I must reach the merits of defendant’s various ineffective assistance of counsel claims regardless of whether or not he raised them on direct appeal because “[a] § 2255 motion is . . . the preferred vehicle for a federal prisoner to allege ineffective assistance of counsel.” *Nahodil*, 36 F.3d at 326. When a defendant seeks § 2255 relief on the ground of ineffective assistance of counsel, the court must first determine whether the defendant’s claims are frivolous. *United States v. Dawson*, 857 F.2d 923, 927 (3d Cir. 1988). Next, the court must evaluate whether the defendant’s non-frivolous claims, accepted as true, “conclusively fail to show ineffective assistance of counsel” under the *Strickland* standard. *Id.* at 927–28. “If a nonfrivolous claim clearly fails to demonstrate either deficiency of counsel’s performance or prejudice to the defendant, then the claim does not merit a hearing.” *Id.* Here, defendant challenges both trial and appellate counsel’s performance.

1. *Trial counsel’s alleged ineffectiveness*

a. *Trial counsel’s alleged failure to interview and subpoena eyewitnesses*

Defendant claims that trial counsel failed to interview and call key eyewitnesses to testify

at trial. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 13, 15, 18, 20.)

Defendant contends that trial counsel should have interviewed two alleged eyewitnesses, Aaron "Pooh" Devine and Latifah Holloway, prior to trial. In support of this claim, defendant provides statements from Devine and Holloway that were taken by a private investigator hired by defendant's family after defendant's trial. (*See* Ex. 2 & 5 to Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot.)

Devine claims that he was riding with defendant in defendant's vehicle from 9:00 p.m. to 9:30 p.m. on the night of defendant's arrest. (Ex. 2 to Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 2A.) Devine alleges that defendant did not have a gun with him at that time. (*Id.*) According to Devine, he would have noticed if defendant had a firearm in the car "because it [was] a real little car." (*Id.*) Defendant contends that trial counsel was ineffective because defendant told him that Devine was present on the night of his arrest and trial counsel neglected to investigate this claim. (Reply in Supp. of Def.'s § 2255 Mot. at 10.)

The government argues that trial counsel was not ineffective for failing to interview Devine because defendant never told trial counsel about this potential witness. (Gov't's Resp. to Def.'s § 2255 Mot. at 10.) However, the government fails to support this claim with any direct evidence.<sup>18</sup> Thus, because I must accept all of defendant's non-frivolous claims as true, I must accept defendant's allegation and assume that defendant told trial counsel that Devine could be a useful witness. *See Forte*, 865 F.2d at 62. If I assume that defendant told trial counsel that

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<sup>18</sup>The government cites correspondence between defendant and trial counsel in which defendant does not mention Devine's name to show that defendant never told trial counsel about Devine. (Gov't's Resp. to Def.'s § 2255 Mot. at 10). However, this proves nothing because defendant could have mentioned Devine in his several phone conversations with trial counsel, which the government fails to account for.

Devine could attest that defendant did not have a weapon on the night of his arrest, and trial counsel failed to investigate this evidence, trial counsel was arguably deficient.<sup>19</sup>

Nonetheless, the record “conclusively shows” that defendant cannot establish that “there is a reasonable probability that . . . the result of the proceeding would have been different” had Devine testified at trial. *Strickland*, 466 U.S. at 694. Although Devine asserts that he would have noticed if defendant had a gun because defendant’s car is “real little,” his statement fails to establish with any certainty that defendant was not in possession of a handgun on the night of his arrest. Defendant could have easily concealed the weapon from Devine by stowing it underneath a car seat, in the glove compartment, in the trunk, or on his person. Further, Devine left defendant at 9:30 p.m., approximately ten minutes before the PHA police allegedly saw defendant with a handgun. Defendant’s presence during these ten minutes is wholly unaccounted for and he certainly could have retrieved the weapon from an apartment or another car during this period. The prosecution surely would have explored these possibilities on cross examination of Devine. In addition, defendant presented no other evidence on the possession issue at trial. For these reasons, defendant has conclusively failed to show that trial counsel’s failure to call Devine “prejudiced” him under the *Strickland* standard. *See Dawson*, 857 F.2d at 927. Even if I assume that Devine’s statement is credible, there is no evidence that could be adduced at an evidentiary hearing that would show that trial counsel’s failure to call Devine “prejudiced” defendant. Hence, defendant has failed to state a colorable ineffectiveness claim and he is not entitled to an evidentiary hearing with respect to Devine’s testimony. *See Dawson*, 857 F.2d at 927.

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<sup>19</sup>If I do not so assume, an evidentiary hearing would be required to resolve any factual disputes.

Defendant also fails to state a valid ineffectiveness claim with respect to Latifah Holloway's statement. Holloway claims that she witnessed the PHA officers apprehend defendant after his vehicle came to a stop. (Ex. 5 to Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 1.) In her statement, Holloway alleges that the police vehicle was not "directly behind" defendant. (*Id.* at 2.) Defendant contends that trial counsel could have used this testimony to impeach Officer Johnson's statement that he "never lost sight" of defendant's vehicle.<sup>20</sup> (N.T. Trial, May 31, 2000, at 53.)

The record "conclusively shows" that defendant cannot establish that trial counsel's failure to interview Holloway "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. Defendant admits that he never told trial counsel about Holloway before trial and that he never discovered her as a potential witness until after the trial. (Reply in Supp. of Def.'s § 2255 Mot. at 10.) Defendant argues that trial counsel would have found Holloway if he performed an adequate investigation. (*Id.*) However, defendant fails to provide any evidence to support this claim. I cannot find that trial counsel was arguably deficient for failing to interview a witness that he had no reason to know about and thus I will deny this claim without an evidentiary hearing.

Defendant also asserts that trial counsel was ineffective because he failed to call a third eyewitness, Andre Williams, to testify at trial. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 13, 15–16, 20.) Trial counsel took Williams's oral statement while he was visiting defendant because defendant and Williams were apparently housed in the same jail.

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<sup>20</sup>However, nothing in this statement relates to whether or not defendant had a handgun in his possession.

(Reply in Supp. of Def.’s § 2255 Mot. at 23.) Williams stated that on the night of defendant’s arrest Officers Johnson and Boyle stopped him in his vehicle on a routine traffic stop. (Ex. 10 to Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot.) Next, Williams claimed that defendant drove by in his vehicle and the officers “took off” after defendant without taking Williams’s paperwork. (*Id.*) Clearly, this statement, if true, calls into question Officer Johnson’s testimony that he saw defendant standing on the street holding a weapon.

In response, the government cites a pre-trial “memo” that was prepared by trial counsel to show that counsel had sound reasons for not calling Williams at trial. (Gov’t’s Resp. to Def.’s § 2255 Mot. at 22). In the “memo,” trial counsel describes his meeting with Williams and says “[w]e will want to get a statement later, *maybe*.” (Ex. 11 to Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot.) (emphasis added). Additionally, trial counsel asks an associate to obtain records of traffic stops made by the PHA police on the night of defendant’s arrest, which indicates that trial counsel was searching for evidence that would corroborate Williams’s testimony. The “memo” suggests that trial counsel had reservations about Williams’s credibility as a witness. This is understandable because Williams was apparently incarcerated at the time of defendant’s trial<sup>21</sup> and if he had been convicted, and the conviction was for a crime punishable by more than one year in prison, which the record fails to indicate, the prosecution could have introduced this evidence to impeach Williams’s credibility pursuant to Federal Rule Evidence

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<sup>21</sup>In the pre-trial “memo” trial counsel states that Williams “is currently at CFCF,” which is an abbreviation for the Curran-Fromhold Correctional Facility in Philadelphia. Further, defendant acknowledges the Williams was housed in his same facility. (Reply in Supp. of Def.’s § 2255 Mot. at 23.) The government suggests that Williams was in custody for a robbery charge, but there is no evidence to support t his claim. (Gov’t’s Resp. to Def.’s § 2255 Mot. at 14).

609(a)(1).<sup>22</sup> Although these arguments have considerable force, I must accept defendant's evidence as true for the purposes of this motion and cannot find valid trial tactics based on possible inferences from an internal file memorandum. Thus, although the record may strongly suggest that trial counsel's decision not to call Williams "might be considered sound trial strategy," it does not "conclusively show" that counsel's performance was not deficient."<sup>23</sup> *Strickland*, 466 U.S. at 689. Hence, I will hold an evidentiary hearing to further develop the facts and resolve whether trial counsel's failure to call Williams to testify at trial denied defendant of effective assistance of counsel. See 28 U.S.C. § 2255 ("Unless the motion and the files and the records of the case conclusively show that the prisoner is entitled to no relief, the court shall . . . grant a prompt hearing thereon.")

b. *Trial counsel's alleged failure to call PHA Officer Boyle as a witness*

Next, defendant claims that trial counsel was ineffective because he failed to call Officer Boyle as a witness. Defendant alleges that Boyle's testimony could have highlighted inconsistencies in Officer Johnson's testimony. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 13–14.) Immediately before trial, defendant wrote the court a letter

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<sup>22</sup>This rule provides that "[f]or the purposes of attacking the credibility of a witness, evidence that a witness other than an accused has been convicted of a crime shall be admitted . . . if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted . . . ."

<sup>23</sup>The government also claims that at a post-trial meeting, trial counsel revealed that he did not call Williams as a witness because defendant would not permit trial counsel to ask Williams about the robbery that defendant allegedly participated in with Williams. (Gov't's Resp. to Def.'s § 2255 Mot. at 10, 14.) However, the government fails to include any evidence to support this claim and for the purposes of this motion, I may not rely on the bare allegations of counsel. Cf. *Schoch v. First Fidelity Bancorp.*, 912 F.2d 654, 657 (3d Cir. 1990).

complaining about trial counsel's representation and specifically trial counsel's intention not to call Officer Boyle as a witness. (N.T. Pre-trial hearing, May 30, 2000, at 3.) At a pre-trial hearing, trial counsel credibly explained that the government did not intend to call Officer Boyle and that defendant "would be in a much better position" if Boyle was not called as a witness by either side because the government would lose a corroborating witness and Boyle's absence would "create a gap" in the government's case that trial counsel could exploit. (N.T. Trial, May 31, 2000, at 24.) In his closing argument, trial counsel indeed focused on Boyle's absence. (*See* N.T. Trial, June 1, 2000, at 22 ("And why isn't [Boyle] here? What inferences can one draw from that? Why wouldn't [the government] present him?")). Further, Boyle's absence allowed trial counsel to question the chain of custody of the gun.<sup>24</sup> (*See* N.T. Trial, May 31, 2000, at 137–38; N.T. Trial, June 1, 2000, at 21–22.) Additionally, trial counsel was able to point out inconsistencies in Officer Johnson's testimony without Boyle's testimony. (N.T. Trial, May 31, 2000 at 161–62.) Hence, although Boyle's testimony could have arguably helped defendant's case in some respects, trial counsel's representation was not deficient because his decision not to call Officer Boyle was certainly "sound trial strategy." *Strickland*, 466 U.S. 689.

c. *Trial counsel's alleged failure to call defendant's ex-fiancee as a witness to testify as to alleged police coercion*

Defendant contends that Detective Brooks coerced defendant's ex-fiancee to say that "[defendant] stole her car" on the night of his arrest. (Mem. of Points and Authorities in Supp. of

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<sup>24</sup>Defendant contends that if trial counsel called Boyle he could have called into question the chain of custody of the weapon. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 13–14.) This argument is illogical because it was Boyle's absence that gave the chain of custody argument some substance.

Def.'s § 2255 Mot. at 14.) Defendant claims that trial counsel was ineffective because he failed to call defendant's ex-fiancee as a witness to testify about this alleged coercion. Defendant fails to provide any support for his allegation against Detective Brooks.<sup>25</sup> Further, trial counsel was not deficient for failing to elicit this testimony (even if there were evidence that it was available) because it would have been inadmissible. There was no evidence introduced at trial that defendant stole the car that he drove on the night of his arrest. Hence, defendant's fiancée's testimony would only be relevant as character evidence to impeach Detective Brooks's testimony. Under Federal Rule of Evidence 608(b), this evidence of a "bad act" would be inadmissible for this purpose because "specific instances of the conduct of a witness, for the purpose of attacking . . . the witness' character for truthfulness, other than the conviction of [a] crime . . . may not be proved by extrinsic evidence." Because defendant's fiancée's statement would be inadmissible, trial counsel was not deficient for failing to introduce this testimony.

d. *Ineffectiveness claims involving the PHA police dispatch recordings*

Defendant makes several allegations in connection with radio transmissions between the PHA officers and PHA police radio during the officers' pursuit of defendant. The radio logs indicate that the officers sent their first transmission at 9:39 pm. However, the first transmission available on tape were not made until 9:42 p.m. At trial, trial counsel offered a portion of the radio transmission into evidence to impeach one of Officer Johnson's statements. (*See* N.T. Trial, May 31, 2000, at 161–62). Trial counsel attempted to introduce the remainder of the tape,

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<sup>25</sup>The exhibit he cites to support this argument ("Exhibit #12") was not included with the other exhibits.

but the court determined that the statements by the dispatcher were inadmissible hearsay. (N.T. Trial, May 31, 2000, at 144.) The parties agreed on a stipulation, which was read to the jury, describing the transmissions and explaining that three minutes of the transmissions were unaccounted for. (*Id.* at 158.) Defendant asserts that trial counsel was ineffective because (1) he failed to request a recording of the transmissions, (2) he failed to make a *Brady* objection in connection with the recordings, and (3) he failed to object to the authenticity of the recording that was eventually played at trial. (Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot. at 13, 16, 20, 21; Reply in Supp. of Def.’s § 2255 Mot. at 29.) All three of these claims are clearly meritless. Contrary to defendant’s first claim, trial counsel obtained a copy of the recording before trial and offered it into evidence. Further, because trial counsel had a copy of the recording, the government did not suppress evidence and there can be no *Brady* violation.<sup>26</sup> To the extent that defendant intends to argue that trial counsel should have objected because the government failed to turn over the missing segment of the transmissions, there is no evidence proffered that this portion of the transmissions was ever available and clearly the government could not suppress evidence that it did not have. Because there is no evidence of a *Brady* violation, trial counsel cannot be faulted for failing to object on these grounds. *See Werts*, 228 F.3d at 203. Finally, because trial counsel introduced the dispatch tape into evidence to bolster defendant’s case, there was no reason for him to object to the authenticity of the tape.

e. *Trial counsel’s alleged failure to challenge the legality of  
defendant’s arrest in a suppression motion*

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<sup>26</sup>Under *Brady v. Maryland*, 373 U.S. 83, 87 (1963), “the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment.”

Defendant contends that trial counsel should have filed a motion to suppress the gun because the PHA officers had no authority to arrest defendant outside of PHA's territorial limits. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 14.) As I described above, defendant did not have a legitimate suppression claim because the officers had jurisdiction to arrest defendant pursuant 35 Pa. Cons. Stat. § 1550(ff). Counsel was not ineffective for failing to raise this meritless claim. *See Werts*, 228 F.3d at 203.

f. *Trial counsel's decision to stipulate that defendant's gun satisfied § 922(g)(1)'s interstate commerce requirement*

Next, defendant contends that trial counsel was ineffective because he “conceded” defendant’s guilt by “cajoling” defendant to stipulate to the interstate commerce element of § 922(g)(1).<sup>27</sup> (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 14, 18.) Defendant argues that because the serial number on the weapon was illegible, counsel could have argued that the weapon was manufactured in Pennsylvania and never traveled through interstate commerce as required by the statute. Defendant claims that trial counsel should have called an expert to testify that the weapon could have been manufactured locally by an “illegal” manufacturer. (*Id.* at 18.) Defendant’s allegations fail to overcome the presumption that counsel’s actions “might be considered sound trial strategy.” *Strickland*, 466 U.S. at 687. At trial, counsel chose to focus on § 922(g)(1)’s possession element. By focusing on this one element, which can often be the most critical issue in § 922(g)(1) cases, *see United States v. Scott* 223 F.3d 208, 209 (3d Cir. 2000), trial counsel avoided extraneous issues that might have confused the jury or prejudiced his client. For instance, if trial counsel had contested the

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<sup>27</sup>Defendant does not contest the fact that he did, in fact, agree to the stipulation.

interstate commerce element, he would have had to rely on the fact that the gun's serial number had been filed off. While this fact would have allowed counsel to speculate about the weapon's origins, it also suggests that the gun had been possessed illegally. In addition, defendant has failed to come forward with any evidence to suggest that his proposed strategy would have been successful. There is no evidence that the weapon was or could have been manufactured illegally or that an expert would testify to that effect, and there is no evidence that a gun manufacturer is or ever has been located in Pennsylvania. Thus, because trial counsel's decision not to contest § 922(g)(1)'s interstate commerce element was conclusively "sound trial strategy," his representation of defendant was not constitutionally ineffective. *Strickland*, 466 U.S. 689.

g.     *Trial counsel's alleged failure to object to evidence of defendant's  
prior bad acts*

Defendant asserts that trial counsel should have challenged the admission of evidence of defendant's prior bad acts under Federal Rule of Evidence 404(b).<sup>28</sup> (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 19.) However, defendant has failed to cite any specific testimony from the record to support his claim. Further, defendant's argument is illogical because defendant himself stipulated that he was a convicted felon. Trial counsel could not object to a stipulation made by his own client. To the extent that defendant intends to challenge counsel's strategic decision to stipulate to defendant's prior offenses, this argument is similarly meritless because this decision was undoubtedly "sound trial strategy." *Strickland*, 466 U.S. 689. By stipulating to § 922(g)(1)'s convicted felon element, trial counsel avoided the

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<sup>28</sup>Rule 404(b) provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to show action in conformity therewith . . . ."

government's presentation of evidence documenting defendant's seven prior criminal convictions. (*See* N.T. Sentencing, May 4, 2001, at 41.) Further, by stipulating to all but one of § 922(g)(1)'s elements, trial counsel streamlined the case and focused the jury's attention on the most critical issue. Finally, trial counsel's decision to stipulate to defendant's past conviction did not prejudice defendant in any way because the court instructed the jury that it could not "use [defendant's] guilt of the prior crime as proof of the crime charged in this case other than [§ 922(g)'s] one element . . . ." (N.T. Trial, June 1, 2000, at 47.)

Defendant also appears to argue that trial counsel mistakenly failed to object under Rule 404(b) when Detective Brooks referred to defendant's Philadelphia Police photo number. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 17, 18.) Defendant claims that this testimony improperly suggested that defendant has a criminal record. At trial, Brooks testified that he used the Philadelphia Police photo number that officers Johnson and Boyle found on a document in defendant's car to identify defendant. (N.T. Trial, May 31, 2000, at 116–19.) Trial counsel had no ground to object to this evidence because it was part of the history of the case. Defendant gave a false name to the police upon his arrest. It was only through the use of the police photo number that the police were able to identify defendant and Officer Brooks's testimony explained to the jury how this was done. Because Officer Johnson testified that he saw the man that he arrested holding a firearm, and because defendant's possession of a firearm was the sole issue at trial, whether or not defendant was the individual who the police arrested was a vital matter. Further, defendant's argument is frivolous because trial counsel initially objected to

this testimony.<sup>29</sup> Finally, even if trial counsel's performance could arguably be deemed deficient for failing to object, defendant suffered no prejudice from the introduction of this evidence because defendant stipulated that he was a convicted felon and thus the jury already knew that he had a criminal record. If defendant had not so stipulated, the government would have been entitled to offer evidence to satisfy § 922(g)(1)'s convicted felon requirement.<sup>30</sup>

h. *Trial counsel's failure to personally examine Officer Johnson's disciplinary files*

Defendant claims that trial counsel should have personally examined Officer Johnson's disciplinary files instead of relying on the representations of PHA counsel, who assured trial counsel that "there [was] nothing bad in [Johnson's] file."<sup>31</sup> (N.T. Pre-trial hearing, May 30, 2000, at 14.) Defendant speculates that trial counsel may have found impeaching evidence in Johnson's disciplinary files because Officer's Boyle's files revealed that he had been suspended from the PHA police force. (*Id.* at 14–15.) Again, defendant's argument is meritless. He fails to come forward with any evidence to suggest that Officer Johnson had a disciplinary record or that

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<sup>29</sup>Trial counsel objected because the document that listed defendant's police number also indicated that the number correlated to an individual named "Anthony Brown," not "Andrew Brown." (N.T. Trial, May 31, 2000, at 117.) The court overruled the objection because the government showed that "Anthony Brown" was another alias used by defendant. (*Id.* at 117, 119.)

<sup>30</sup>To the extent that defendant intends to argue that trial counsel should have objected to references to his police photo number under Federal Rule of Evidence 403, this argument is similarly meritless. As I explained above, this evidence was more probative than prejudicial because it was necessary to prove that defendant was the man that Officer Johnson saw holding a firearm.

<sup>31</sup>PHA counsel made this representation to the government prior to trial and repeated it in open court. (*See* N.T. Trial, May 30, 2000, at 14.) In addition, trial counsel spoke to PHA counsel prior to the trial and was given the same information.

trial counsel had access to Johnson’s disciplinary files. Further, under *Brady*, the government had an “obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment.” *Pennsylvania v. Ritchie*, 480 U.S. 39, 57 (1987) (citations omitted). Trial counsel was entitled to rely on the government to uphold its responsibilities under the law.<sup>32</sup>

i. *Trial counsel’s alleged failure to protect defendant’s speedy trial rights*

Defendant claims that trial counsel was ineffective because he failed to move to dismiss the indictment under the Speedy Trial Act on account of the fact that defendant was indicted more than thirty days after his state arrest. (Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot. at 16.) As I described above, this claim is meritless because defendant did not have a valid claim under the Speedy Trial Act. *See* Part III.D.

Defendant also argues that he is entitled to § 2255 relief because trial counsel waived his right to a speedy trial under the Speedy Trial Act when he filed for a continuance. (Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot. at 16.) This claim is illogical and clearly frivolous. The Speedy Trial Act provides that a criminal defendant’s trial “shall commence within seventy days” of the later of “the filing date (and making public) of the information or indictment or . . . the date the defendant has appeared before a judicial officer of the court in

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<sup>32</sup> Although there is no evidence that there was *Brady* material in Officer Johnson’s file, to give defendant further reassurance, I granted defendant’s recent motion for discovery and ordered government counsel to review the file for *Brady* material rather than rely solely on the representations of PHA counsel. *See United States v. Brown*, No. 99-730 (E.D. Pa. June 6, 2005) (order). There was none. *See* Letter from Lesley B. Fitzgerald, Assistant U.S. Att’y, to Hon. William H. Yohn, Jr. (June 23, 2005).

which such charge is pending . . . .” 18 U.S.C. § 3161(c)(1). The Act further provides that “any period of delay resulting from a continuance granted by [a] judge” “shall be excluded . . . . in computing the time within which the trial of any such offense must commence.” *Id.* at § 3161(h)(8)(A). Here, trial counsel filed two separate unopposed motions for a continuance on January 5, 2000 and March 13, 2000. In these motions, trial counsel explained that he needed further time to investigate and review discovery material and that he was unavailable for trial due to previously scheduled court appearances. The court granted both motions pursuant to § 3161(h)(A). Defendant’s trial was ultimately rescheduled for May 30, 2000, more than seventy days after defendant’s indictment was filed on November 16, 1999. Nonetheless, because the court granted a continuance, which was based on defendant’s own motions, the entire period of the continuance was excluded under § 3161(h)(8). Hence, there was no speedy trial violation and defendant has no basis to challenge counsel’s performance. Further, trial counsel had valid reasons for requesting a continuance because he was appointed after the litigation had begun, when defendant’s first lawyer withdrew, and because the government did not disclose Officer Boyle’s disciplinary record until March 9, 2000, eleven days before defendant’s trial was scheduled to begin, both of which events required trial counsel to seek additional time to prepare adequately for trial.

j. *Trial counsel’s failure to object to the absence of African-American men among the prospective jurors*

Defendant claims that during voir dire trial counsel should have objected because defendant was deprived of his Sixth Amendment right to a jury panel that was selected at random from a fair cross section of the community. (Mem. of Points and Authorities in Supp. of Def.’s §

2255 Mot. at 16.); *see Taylor v. Louisiana*, 419 U.S. 522, 538 (1975) (“[J]ury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof.”) To establish a cross section violation, a defendant must show that: “(1) the group alleged to be excluded is a ‘distinctive’ group in the community; (2) the representation of this group in jury venires is not ‘fair and reasonable’ in relation to the number of such persons in the community; and (3) the under representation is caused by the ‘systematic exclusion of the group in the jury selection process.’” *United States v. Weaver*, 267 F.3d 231, 237 (3d Cir. 2001) (quoting *Duren v. Missouri*, 439 U.S. 357, 364 (1979)).

In the present motion, defendant has failed to cite the racial or gender composition of the jury venire. At the sentencing hearing, defendant alleged that there was not a single African-American man in the jury panel. (N.T. Sentencing, May 4, 2001, at 38.) Defendant has provided no evidence to substantiate this claim. However, my contemporaneous notes made at the time of jury selection indicate that there were indeed no African-American men on the jury panel. There were, however, five African-American women<sup>33</sup> and eighteen men on the forty-person panel.<sup>34</sup> Hence, the composition of defendant’s jury panel does not suggest in any way that African-Americans or men were underrepresented or systematically excluded from the jury venire. Further, even if there were no African-Americans or men on the jury panel, these facts alone would be insufficient to establish a cross-section violation without additional proof of a “systemic

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<sup>33</sup>Three African-Americans eventually sat on the jury, one was stricken for cause and one was stricken by agreement of the parties.

<sup>34</sup>Defendant has submitted no authority, and this court knows of none, that suggests that there must be African-American men on a panel to comply with the Sixth Amendment.

exclusion” in the jury selection process. *See United States v. Alix*, 86 F.3d 429, 434 n.3 (5th Cir. 1996) (“[A] defendant cannot establish a prima facie violation of the fair-cross-section requirement by relying solely on the composition of the jury panel at his own trial.”) (citation omitted); *United States v. Guy*, 924 F.2d 702, 706 (7th Cir. 1991) (“Guy’s mere observation that there were no African-Americans on a panel that was drawn from a population containing African-Americans simply is not sufficient to demonstrate any systematic exclusion.”); *United States v. Diaz*, No. 92-78, 1993 U.S. Dist. LEXIS 3569, at \*24 (E.D. Pa. March 25, 1993) (“Absent any additional statistical analysis, the court finds that the defendant’s sole observation [that there were no Hispanics on the jury panel] fails to show a systematic exclusion . . .”) (citations omitted). Because defendant did not have a valid cross section claim, his ineffectiveness claim is meritless. *See Werts*, 228 F.3d at 203.

k. *Trial counsel’s alleged failure to visit defendant*

Defendant also asserts that trial counsel was ineffective because he only visited defendant once before trial. (Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot. at 16.) Defendant made a similar allegation in the pre-trial hearing. At the hearing, trial counsel credibly stated that he met with defendant on ten to fifteen different occasions while defendant was in state custody, and once after defendant was moved to a federal facility in northern New Jersey. (N.T. Pre-trial hearing, May 30, 2000, at 18.) Additionally, trial counsel explained that since defendant was moved to federal custody, he spoke with him on “a few occasions” on the telephone and discussed the case with defendant’s girlfriend “on several occasions.” (*Id.*) After hearing this testimony, I found that trial counsel had interacted with defendant sufficiently to prepare the case for trial. (*Id.* at 20.) Further, I instructed defendant that in my estimation trial

counsel had worked diligently on his case and I was “surprised that [defendant] want[ed] to discharge” him. (*Id.*) Defendant has not come forward with any additional information that might cause me to rethink my initial conclusion. Trial counsel worked diligently on defendant’s case and his performance in visiting defendant and discussing the case with defendant was far from constitutionally deficient.

1. *Trial counsel’s failure to object to Officer Johnson’s alleged suggestion that defendant was involved in additional criminal activity*

Defendant argues that trial counsel’s performance was deficient because he failed to object to allegedly improper suggestions made by Officer Johnson. (Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot. at 17, 18.) At trial, on direct examination, the government’s attorney asked Johnson about the lighting conditions in the area where he and Officer Boyle observed defendant holding a gun. Johnson replied that the area was well lit because the PHA had “placed some very high powered lighting in the [that area] because of the activity that goes on there.” (N.T. Trial, May 31, 2000, at 44–45.) Defendant contends that Johnson’s comment about “the activity that goes in there” suggests that defendant was involved in criminal activity because he was allegedly standing in this area. Defendant’s argument is frivolous. Johnson’s testimony suggests nothing improper and trial counsel had no reason to object.

m. *Trial counsel’s failure to object to Brooks’s references to defendant’s alias*

Defendant claims that trial counsel should have objected to references to defendant's alias, "Tyree Bryant," because it improperly suggested that he was guilty of the crime and that he has a criminal history. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 17, 18.) Under Federal Rule of Evidence 403, "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Courts that have applied this rule to alias evidence have determined that prosecutors may introduce evidence of the use of an alias to show that a defendant believed that he was guilty of the crime at issue, *see United States v. Glass*, 128 F.3d 1398, 1408 (10th Cir. 1997) ("A defendant's use of an alias to conceal his identity from law enforcement officers is relevant as proof of consciousness of guilt.") (citation omitted); *United States v. Boyle*, 675 F.2d 430, 432 (1st Cir. 1982) (same), but not to suggest that the defendant has a criminal history or a general criminal propensity.<sup>35</sup> *United States v. Scarborough*, 128 F.3d 1373, 1379 (10th Cir. 1997) (acknowledging the argument that "the jury might infer from the presence of an alias . . . that defendant had been involved in illegal activities long before the crime in question."); *United States v. Jasinski*, No. 89-224-1, 1989 U.S. Dist. LEXIS 15503, at \*5-\*6 (E.D. Pa. 1989 Dec. 21, 1989) (determining that the use of an "a/k/a name" was not unfairly prejudicial because it "is not a name which in itself connotes criminality"). Here, defendant himself used the name "Tyree Bryant" when he was interviewed by Detective Brooks after his arrest. Evidence of defendant's use of an alias was part of the history of the case and was clearly relevant to show that defendant was trying to conceal his

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<sup>35</sup> Additionally, under Federal Rule of Evidence 404, the prosecution cannot introduce alias evidence solely to show a defendant's propensity to commit a crime because, "[e]vidence of person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith . . . ."

identity, which suggests that defendant was conscious of his guilt of the crime. As I described above, this was a permissible use of such evidence. *See Glass*, 128 F.3d at 1408. Moreover, defendant's alias, "Tyree Bryant," is not the type of name that might unfairly prejudice defendant because it does not "in itself connote[] criminality, as do nicknames such as 'Frankie the Beast,' 'The Snake, or 'Fast Eddie'"" *Jasinski*, 1989 U.S. Dist. LEXIS 15503 at \*6 (citations omitted). *See also United States v. Trice*, 1996 U.S. Dist. LEXIS 15154, at \*17–\*18 (E.D. Pa. Oct. 9, 1996) ("The use of an alias such as 'Larry Leggett' is simply not likely 'to arouse the jury's sense of horror, provoke its instinct to punish, or lead the jury to base its decision on something other than the established facts in the case.'") (citation omitted). Additionally, the court specifically instructed the jury that it could not infer from defendant's use of an alias alone that he was guilty. (N.T. Trial, June 1, 2000, at 45–46.) For these reasons, defendant's claim is frivolous and trial counsel was not deficient for failing to object to the government's introduction of this evidence. Moreover, even if trial counsel's conduct could somehow be construed to be deficient, defendant suffered no prejudice.

n. *Trial counsel's failure to object or request a cautionary instruction to testimony concerning defendant's post-arrest statements*

Defendant argues that trial counsel should have objected or asked for a cautionary instruction when Detective Brooks testified about the statements that defendant made immediately following his arrest. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 17.) Defendant contends that counsel should have objected because defendant had not been read his *Miranda* rights and hence was not warned that his post-arrest statements could be used against him (*Id.*) In support of this argument, defendant cites a segment of Officer

Brooks's trial testimony in which he describes his post-arrest interview with defendant. Brooks testified that defendant identified himself as "Tyree Bryant" and denied that his name was "Andrew Brown." (N.T. Trial, May 31, 2000, at 112.) Additionally, defendant gave Brooks his address and the name and phone number of the owner of white Acura. (*Id.*) There is no evidence in the record that the arresting officers failed to read defendant his *Miranda* rights. Further, even if the officers did not give defendant his *Miranda* warnings, his statements to Detective Brooks concerning his name and address would be admissible because they fall within the well-recognized exception to *Miranda* for "'biographical data necessary to complete booking or pretrial services.'" *Pennsylvania v. Muniz*, 496 U.S. 582, 601 (1990) (citation omitted). Under this exception, police officers may ask a suspect routine booking questions such as his name, address, height, weight, eye color, date of birth, and current age without obtaining a waiver of his *Miranda* rights, so long as the questions are not "designed to elicit incriminatory admissions." *Id.* at 601–02 & n.14. Because defendant's post-arrest statements relating to his name and address would have been admissible even if the police had failed to read defendant his *Miranda* rights, trial counsel had no reason to object to the introduction of this evidence. Moreover, even though Brooks's question concerning the owner of the Acura may not fall within the biographical information exception and arguably may have been "designed to elicit incriminatory admissions," there is no evidence that defendant disclosed any incriminating information in response to this question because the ownership of the vehicle was not relevant to his prosecution, and thus trial counsel had no reason to object. For these reasons, trial counsel's performance was not deficient for failing to object on *Miranda* grounds.

o. *Trial counsel's failure to object to Detective Brooks alleged*

*improper attempt to vouch for Officer Boyle*

Defendant also claims that trial counsel should have objected because Detective Brooks improperly bolstered Officer Boyle's credibility. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 17.) However, the portion of the record that defendant cites lends no support to this argument. Defendant cites Brooks testimony that he decided not to submit the gun recovered by Johnson and Boyle for fingerprint analysis because his information was that both officers saw defendant holding the weapon. (N.T. Trial, May 31, 2000, at 124.) Brooks said nothing about Boyle's credibility in his testimony. He merely explained his own reasons for not having the gun checked for fingerprints. Further, the sole case that defendant relies upon is inapposite. Defendant cites *Crawford v. Washington*, 541 U.S. 36, 68–69 (2004), where the Supreme Court held that “[w]here testimonial statements are at issue, the only indicium of reliability sufficient to satisfy constitutional demands is . . . confrontation.” Here, the government never introduced a statement by Officer Boyle and consequently, *Crawford* is irrelevant. For these reasons, I conclude that defendant's claim is frivolous.

p.     *Trial counsel's failure to object to Detective Brooks's allegedly  
improper expert testimony*

Defendant asserts that trial counsel should have objected because Brooks gave improper expert testimony when he explained his practice as to when firearms are typically submitted for fingerprint analysis. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 17.) This argument is meritless because trial counsel objected on these grounds and the objection was overruled after the prosecution established a foundation. (N.T. Trial, May 31, 2000, at 122–23.)

Additionally, trial counsel had no ground to object. This was not opinion testimony by an expert, but testimony as to facts about the practice and procedures of the police department and, particularly, Detective Brooks. Moreover, even if this testimony were somehow considered lay opinion testimony, under Federal Rule of Evidence 701, witnesses who have not been qualified as experts may provide opinions that are “rationally based on the perception of the witness . . . and not based on scientific, technical, or other specialized knowledge . . . .” Here, Brooks described when firearms were ordinarily submitted for fingerprint analysis in his own personal experience. (N.T. Trial, May 31, 2000, at 124.) This testimony was based on Brooks’s memory and not on any specialized knowledge or skill. Hence, Brooks’s testimony was proper, the claim is frivolous, and trial counsel was not deficient.

q. Whether trial counsel had an “actual conflict of interest”

Defendant argues that defendant’s representation was ineffective because he had an “actual conflict of interest” that adversely affected his performance. (Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot. at 18). Again, defendant provides no support for this allegation and this claim must fail.

r. Trial counsel’s alleged failure to act as an advocate

Next, defendant alleges that trial counsel was constitutionally ineffective because he failed to act as an advocate for defendant. (Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot. at 18.) Defendant provides no evidence to support this claim. Moreover, as I described above, at the pre-trial hearing, I found that trial counsel had diligently prepared for defendant’s case. (N.T. Pre-trial hearing, May 30, 2000, at 20.) Thus, defendant’s claim is

meritless.

s. *Trial counsel's advice that defendant not testify*

Defendant also contends that trial counsel was ineffective because he “cajol[ed] defendant not to testify.”<sup>36</sup> (Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot. at 21.) Defendant again fails to provide any evidence to support this claim. Further, even if counsel did advise defendant not to testify, the decision could certainly be considered “sound trial strategy” because defendant’s proffered version of the incident is very problematic and his testimony would have allowed the government to cross examine him on the full extent of his substantial criminal record.<sup>37</sup>

t. *Trial counsel's failure to object to the prosecution alleged improper summation*

Finally, defendant argues that trial counsel was ineffective because he failed to object to the government’s allegedly improper summation. (Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot. at 21.) Again, defendant fails to cite any specific portion of the record to support his claim. Further, the Third Circuit already considered the prosecution’s summation and

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<sup>36</sup>Defendant does not allege that trial counsel did not permit him to testify and I specifically advised defendant at the beginning of the trial that his decision whether or not to testify was his and his alone. (*See* N.T. Pre-trial hearing, May 30, 2000, at 22–23.)

<sup>37</sup>According to the United States Probation Office’s Presentence Investigation Report, defendant has been convicted on seven different occasions for the following crimes: (1) criminal conspiracy, criminal trespass, and defiant trespasser (2) robbery, theft, and receipt of stolen property, (3) robbery and criminal conspiracy, (4) violation of Pennsylvania’s Drug, Device and Cosmetic Act, (5) theft by unlawful taking, (6) aggravated assault and possession of an instrument of a crime, and (7) statutory sexual assault.

concluded that “the statements made in the summation were proper and [defendant’s] right a fair trial was not infringed.” 54 Fed. Appx. at 345. Because defendant alleges no ground to challenge the prosecution’s summation, the claim is frivolous and trial counsel cannot be considered deficient for failing to raise this issue at trial.<sup>38</sup>

2. *Appellate counsel’s alleged ineffectiveness*

Defendant also contends that appellate counsel’s performance was ineffective. Most of defendant’s allegations resemble his claims against trial counsel and are similarly frivolous or without merit. To show that appellate counsel was constitutionally ineffective, a defendant “must show that counsel’s performance was objectively unreasonable, and that there is a reasonable probability that the outcome of his appeal would have been different if counsel had raised the claim.” *Chambers v. Bowersox*, 157 F.3d 560, 566 (3d Cir. 1998).

a. *Appellate counsel’s failure to challenge the legality of defendant’s arrest in a suppression motion*

Again, defendant asserts that counsel should have challenged the PHA officer’s authority to arrest him outside of the PHA’s territorial limits. (Mem. of Points and Authorities in Supp. of Def.’s § 2255 Mot. at 23.) As I described above, this claim is meritless and thus appellate counsel had no basis to raise it. *See* Part II.C.

b. *Appellate counsel’s failure to raise a speedy trial claim*

Defendant also claims that appellate counsel should have made two speedy trial

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<sup>38</sup>Defendant makes various additional challenges to trial counsel’s representation, but I need not consider these allegations because they are either repetitive or clearly frivolous.

arguments because defendant's indictment was returned more than thirty days after his state arrest and defendant was tried more than seventy days after his indictment. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 23.) As I explained above, both of these claims have no merit. *See* Part II.D. & II.F.1.i.

c. *Appellate counsel's failure to challenge the alleged deficiency in defendant's indictment*

Defendant also argues that appellate counsel should have challenged the indictment because it was not signed by the grand jury foreperson. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 23.) Again, this claim is frivolous and appellate counsel was not deficient for failing to raise it. *See* Part II.E.

d. *Appellate counsel's failure to develop an adequate record*

Finally, defendant contends that appellate counsel refused to develop an adequate record on appeal with respect to trial counsel's performance to protect trial counsel's reputation. (Mem. of Points and Authorities in Supp. of Def.'s § 2255 Mot. at 23.) Defendant provides no support for this allegation. Moreover, as I described above, defendant's ineffectiveness claims with respect to trial counsel are meritless. *See* Part II.F. Hence, even if appellate counsel's treatment of these claims was deficient, defendant suffered no prejudice. *See Chambers*, 157 F.3d at 566.

### **III. CONCLUSION**

For the foregoing reasons, I will grant defendant's request for an evidentiary hearing to resolve his ineffectiveness claim that relates to trial counsel's alleged failure to call Andre

Williams to testify at trial. I will deny the remainder of defendant's 28 U.S.C. § 2255 claims without an evidentiary hearing. An appropriate order follows.

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

UNITED STATES OF AMERICA,	:	CRIMINAL ACTION
	:	
v.	:	No. 99-730
	:	
ANDREW BROWN, also known as TYREE BRYANT,	:	CIVIL ACTION
Defendant.	:	
	:	No. 04-4121
	:	

**ORDER**

AND NOW, on this \_\_\_\_\_ day of June, 2005, upon consideration of defendant Andrew Brown's motion to vacate, set aside or correct his sentence under 28 U.S.C. § 2255 (Doc. No. 96), the government's response thereto (Doc. No. 103), and defendant's reply (Doc. No. 110), it is hereby ORDERED that:

1. An evidentiary hearing is scheduled for August 5, 2005, at 9:30 a.m., in Courtroom No. 14B, to resolve defendant's ineffective assistance of counsel claim that relates to trial counsel's alleged failure to call Andre Williams to testify at trial.
2. Stephen P. Patrizio, Esq. is appointed as counsel for defendant to represent him at the hearing scheduled in paragraph 1 of this order.
3. The clerk should send a copy of this memorandum and order to Stephen P. Patrizio, Esq.
4. The balance of defendant's § 2255 motion is DENIED with prejudice.

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William H. Yohn, Jr., J.

